BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

DOUGLAS L. TOOLEY, Petitioner, v. GOVERNOR CHRISTINE GREGOIRE, AND CITY OF SEATTLE, Respondents.	**CASE NO. 11-3-0008** ***(Tooley II)*** **ORDER ON DISPOSITIVE MOTIONS**

SYNOPSIS

Because the Board determines it lacks subject matter jurisdiction to review Petitioner's claims, the case is dismissed. Petitioner's summary judgment motion on jurisdiction is denied, and the Respondents' motions to dismiss for lack of jurisdiction are granted. The Board also determines the Petitioner lacks standing to assert a SEPA claim. The Board does not rule on the issues of service or sufficiency of the petition.

I. BACKGROUND

THIS Matter came before the Board on cross-motions of all the parties. At the Prehearing Conference the parties agreed threshold questions concerning the Board's jurisdiction would be raised and decided on motions.[1] The Prehearing Order provided for cross-filing of dispositive motions on an extended schedule and indicated the issues intended to be raised.[2] In the motions and briefs subsequently filed, the Board was thoroughly apprised of

[1] Prehearing Order (August 31, 2011)
[2] *Id*. at 3-4: "Petitioner's dispositive motion will address some or all of Legal Issues 1-7, focusing on whether the Board has jurisdiction (a) because the challenged action is a de facto amendment to the Seattle Comprehensive Plan – Legal Issues 1 and 2, (b) because the GMA requires compliance by the State – Legal Issue 7, or (c) because SEPA process requirements have been violated – Legal Issue 3.

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the jurisdictional questions at issue and the relevant facts and authorities.[3] No oral argument was deemed necessary.

Petitioner moved for summary judgment, in essence asking the Board to make a determination of jurisdiction based on four issues. The City of Seattle moved to dismiss for lack of jurisdiction and Petitioner's lack of standing. The State moved to dismiss based on Petitioner's lack of standing, failure of service, flaws in the form of petition and lack of jurisdiction.

In this Order, the Board addresses, first, the various motions and declarations for supplementation of the record, second, the question of jurisdiction as presented in Respondents' motions for dismissal and Petitioner's motion for summary judgment, and third, other alleged grounds for dismissal.

II. SUPPLEMENTATION OF THE RECORD

The Prehearing Order deferred the requirement to file an Index subject to the Board's decision on dispositive motions.[4] Consequently, some preliminary matters require factual documentation. Each of the parties has submitted motions to supplement, declarations and exhibits providing the facts necessary to their arguments concerning jurisdiction, standing, and service. The Board rules on these matters as follows.

The City's dispositive motions will address jurisdiction and standing. The State's proposed motions raise a number of issues, including (a) SEPA standing under WAC 197-11-545(2), (b) GMA standing under RCW 36.70A.280(2)(b) and (d), (c) improper service under WAC 242-03-230(2)(b), and (d) lack of subject matter jurisdiction under RCW 36.70A.280(1), .290(2) and .300(1)."

[3] A complete log of filings is Attachment B to this Order.

[4] Prehearing Order at 5: "At the State's request, and in light of the volume of materials involved, the Board will allow the Index to be filed after dispositive motions are decided, as the Order on Motions may narrow or clarify the issues, or dispose of some or all of the case."

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First Declaration of Petitioner (October 13, 2011) and Petitioner's First Motion to Supplement the Record (October 14, 2011).

Mr. Tooley's declaration provides information about his training, his professional qualifications, and his citizen activism on land use matters. The declaration states: "Standing is established by the above." The Petitioner's motion is **granted** and the declaration is **admitted** as necessary to Petitioner's allegations concerning his standing to bring this appeal.

Petitioner's Procedural Motion Concerning Form of Evidence (October 13, 2010); Second Motion to Supplement Record (October 14, 2011); Third Motion to Supplement Record (October 22, 2011) and Preliminary Motion for Finding and Orders Regarding Financial Matters (October 22, 2011).

Mr. Tooley first moves to allow electronic reference to voluminous public records, such as the Final EIS of the Alaskan Way Viaduct Replacement Project and the City of Seattle Comprehensive Plan, rather than requiring paper printouts. In his second motion, Mr. Tooley moves that the City and State be required to prepare specific portions of the record as a "partial preliminary Index." Mr. Tooley's third motion requests that he be allowed to prepare a "Public Media Index of Record." Mr. Tooley's fourth motion requests the Board to rule as a matter of law that the Respondents' failure to comply with the legislative requirements for the Viaduct replacement financing, as set forth in RCW 47.01.402, violates the Growth Management Act requirements for consistency.

The City of Seattle and State filed objections to the Petitioner's motions for supplementation.[5] Because the Board must dismiss this matter for lack of jurisdiction, no further record will be needed. Petitioner's motions are therefore **denied**.

[5] City of Seattle's Opposition to Petitioner's Second and Third Motions to Supplement the Record (October 25, 2011); State's Response to Petitioner's Motions to Supplement the Record (October 27, 2011)

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City of Seattle's Motion to Supplement the Record for Dispositive Motions and Declaration of Eleanor S. Baxendale (September 28, 2011).

The City seeks admission of:

- the text of Mr. Tooley's February 15, 2011 blog,
- Mr. Tooley's July 28, 2011 letter to the Board accompanying the PFR, and
- Mr. Tooley's February 21, 2011 Request for Reasonable Accommodation, which was submitted to the Board by Mr. Tooley with the PFR.

The Petitioner has no objection to the City's motion.[6]

The Board finds the February 15, 2011 blog is necessary to a finding of fact concerning Mr. Tooley's participation standing and/or SEPA standing. The Board determines Mr. Tooley's July 28, 2011 cover letter and enclosed Request for Reasonable Accommodation may be of substantial assistance to its findings of fact concerning standing. The City's motion is **granted** and the three documents are **admitted**.

City of Seattle's Second Motion to Supplement the Record for Dispositive Motions (October 6, 2011).

The City seeks admission of the Declaration of Laurie Menzel with pages from the August 16, 2011 King County Voters' Pamphlet, including the page setting out the text and explanatory statement of Referendum 1, the Alaskan Way Viaduct replacement agreements referendum measure. The Board determines the attachment contains information that may be necessary or of substantial assistance in determining the Board's jurisdiction. The City's motion is **granted** and the Menzel declaration and attachment are **admitted**.

[6] Petitioner's Response to City of Seattle's Motion to Supplement the Record (October 6, 2011)

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The State submits the <u>Declarations of Allison Hanson and Melissa Minjares (September 29, 2011)</u>.[7]

Allison Hanson is the Environmental Services Director for Mega-Projects for the Washington State Department of Transportation (WSDOT). Her declaration outlines the public notice, hearings, and comment procedure for the Alaskan Way Viaduct Replacement environmental review. The attachments are copies of public notices in the Federal Register, Daily Journal of Commerce, and Seattle Times.

Melissa Minjares is a paralegal with the State Attorney General at the Transportation and Public Construction Division. Her declaration documents her inquiries at various state offices concerning service of the Petition for Review.
The Petitioner has filed no objection to the proposed supplementation.

The Board finds the Hanson declaration and attachments are of substantial assistance to its findings of fact concerning Petitioner's standing under SEPA or the GMA. The Board finds the Minjares declaration and documents are of substantial assistance to its findings of fact concerning sufficiency of service of the PFR. The Hanson and Minjares declarations and exhibits are **admitted** as supplements to the record.

III. SUBJECT MATTER JURISDICTION

The Petition for Review challenges the Alaskan Way Viaduct Replacement Project Final Environmental Impact Statement (FEIS).[8] The FEIS was issued July 20, 2011 by the Federal Highway Administration, Washington State Department of Transportation and City of Seattle under NEPA and SEPA.

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[7] The State has not accompanied these declarations with a motion to supplement, and Petitioner has raised no objection to the omission.
[8] The FEIS is online at www.wsdot.wa.gov/Projects/Viaduct/library-environmental.htm#2011feis.

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Applicable Law

RCW 36.70A.280(1) establishes the Board's subject matter jurisdiction in relevant part as follows:

> (1) The growth management hearings board shall hear and determine *only* those petitions alleging … (a) that … a state agency, county or city planning under this chapter [GMA] is not in compliance with the requirements of this chapter, chapter 90.58 RCW [SMA] as it relates to the adoption of shoreline master programs or amendments thereto, or *chapter 43.21C RCW* [SEPA] *as it relates to plans, development regulations, or amendments, adopted* under RCW 36.70A.040 or Chapter 90.58 RCW [the GMA or SMA]...[9]

RCW 36.70A.290(1) provides in relevant part: "All requests for review to the growth management hearings board shall be initiated by filing a petition that includes a detailed statement of issues presented for resolution by the board." The Section continues:

> (2) All petitions relating to whether or not an adopted comprehensive plan, development regulation or permanent amendment thereto, is in compliance with the goals and requirements of [GMA, SMA or SEPA] … must be filed within sixty days after publication by the county or city...

RCW 43.21C.075 provides a further limitation on appeals of SEPA determinations:

> (1) Because a major purpose of [SEPA] is to combine environmental considerations with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action…. The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action.
>
> (2)(a) Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations.

Positions of the Parties

Petitioner contends the Board has jurisdiction because of four clear errors within GMA and/or SEPA purview. First, he contends the project was finalized prior to completion of SEPA analysis, violating SEPA requirements. Second, Petitioner asserts the size and scope of the project makes it a *de facto* amendment to Seattle's Comprehensive Plan.

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[9] Emphasis added.

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Third, project funding violates the mandate of the Legislature, according to Petitioner. Fourth, Petitioner argues the GMA requirement for coordination among regional partners has been violated, triggering GMA jurisdiction under RCW 36.70A.420 and .430. Additionally, Petitioner asserts the August 16, 2011, City of Seattle advisory ballot[10] does not alter the Board's responsibility to apply the requirements of the GMA and SEPA.

The City argues the Board lacks jurisdiction to review a SEPA analysis in isolation from a government action that is an adoption or amendment to a comprehensive plan or development regulation.[11] Even a *de facto* amendment must be a government action, according to the City, while a SEPA determination is merely information about a proposed action.[12] Because the Petition for Review does not identify and challenge a government action, the City argues, the Board lacks jurisdiction.

The State's motion adopts the City's arguments regarding lack of jurisdiction. The State also contends Petitioner has failed to identify a specific government action by a specific state agency that would allow the board to determine whether the petition was filed within the requisite 60-day time allowed by RCW 36.70A.290(2).[13] In addition, the State asserts the Board lacks jurisdiction over WSDOT's project-specific decisions, which are only appealable under the APA.[14]

Board Discussion

It is well-settled that the Growth Management Hearings Board, as an administrative agency of the State, is a "creature of the Legislature," without inherent powers. Thus, the Board

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[10] Seattle voters by referendum approved the City Council process for Viaduct replacement contract authorization.
[11] City Dispositive Motion at 1.
[12] *Id.* at 2.
[13] State Dispositive Motion at 9
[14] Citing RCW 34.05.514 and .570(4)

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may exercise only those powers conferred by statute."[15] The GMA is not liberally construed.[16]

The Growth Management Act at RCW 36.70A.280 carefully defines the matters subject to the Board's review:

> (3) The growth management hearings board shall hear and determine *only* those petitions alleging … (a) that … a state agency, county or city planning under this chapter [GMA] is not in compliance with … chapter 43.21C RCW [SEPA] *as it relates to plans, development regulations, or amendments, adopted* under [the GMA or SMA].[17]

The Board may *only* review a SEPA challenge that is directly related to the *adoption or amendment* of a GMA or SMA plan or development regulation.

This limitation on the scope of the Board's SEPA review is reiterated three times in the statutory requirements concerning the Board's final order – RCW 36.70A.300:[18]

> (1) The Board shall issue a final order that shall be based *exclusively* on whether or not a state agency, county or city is in compliance with … chapter 43.21C RCW *as it relates to adoption of plans, development regulations, and amendments* thereto, under RCW 36.70A.040 or Chapter 90.58 RCW.
>
> (3)(a) … compliance with the requirements of … chapter 43.21C RCW *as it relates to adoption of plans, development regulations, and amendments* thereto, under [GMA and SMA].
>
> (3)(b) … not in compliance with the requirements of … chapter 43.21C RCW *as it relates to adoption of plans, development regulations, and amendments* thereto, under [GMA and SMA].

In short, the Board lacks jurisdiction to determine SEPA compliance except as it is tied directly to "adoption" or "amendment" of a GMA or SMA plan or regulation.

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[15] *Skagit Surveyors and Engineers, et al v. Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998).
[16] *Id*. at 565. While in some instances Board action beyond the express language of the statute may be "necessarily implied," (*Id.* at 564; *ICAN v. Jefferson County*, Div. II Court of Appeals, No. 40338-2-II, 2011 Wash.App. LEXIS 2075 (Sept. 7, 2011), at 10) no such analysis is warranted here.
[17] Emphasis added.
[18] Emphasis added.

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This limitation is consistent with SEPA and the case law construing SEPA. SEPA itself states that all SEPA appeals must appeal "a specific governmental action" together with the SEPA document or lack thereof. RCW 43.21C.075 states:

> (1) Because a major purpose of [SEPA] is to combine environmental consideration with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action…. The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action.
>
> (2)(a) Appeals under this chapter shall be of a governmental action together with its accompanying environmental determinations.
>
> (2)(b) Appeals of environmental determinations made (or lacking) under this chapter shall be commenced within the time required to appeal the governmental action which is subject to environmental review.
>
> (6)(c) Judicial review under this chapter shall without exception be of the government action together with its accompanying environmental determinations.

Thus, the Washington Supreme Court held, "Interlocutory judicial review of a State Environmental Policy Act (SEPA) determination must 'without exception' be coupled with review of the final action on the application." [19]

In the present case, the Petitioner has not identified any final action by the City or State that constitutes adoption or amendment of a GMA plan or development regulation or even that could trigger a finding of *de facto* amendment.

A SEPA document or determination is information for a government action: it is not itself the binding decision of the agency or jurisdiction. By definition, a SEPA determination is a "detailed statement" of impacts, effects, alternatives, and resources created by an action the SEPA determination is evaluating.[20] The function of SEPA determinations is to have

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[19] *Saldin Securities, Inc. v. Snohomish County*, 134 Wn.2d 288, 294, 934 P.2d 370 (1998).
[20] RCW 43.21C.030(2)(c).

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"environmental considerations become part of normal decision making."[21] It is to "provide consideration of environmental factors . . . to allow decisions to be based on complete disclosure of environmental consequences."[22] In *Moss v. City of Bellingham,* [23] the Court explained:

> Contrary to popular belief, 'SEPA does not demand a particular substantive result in government decision making'; rather, it ensures that environmental values are given appropriate consideration."

Thus, a SEPA determination is not in itself a distinct appealable action separate from the underlying governmental decision; rather, the SEPA determination informs decision makers, as well as the public, regarding the environmental consequences of the proposed action.

In the matter before us, the Viaduct replacement FEIS provided information to decision makers. Seattle City Council Ordinance 123542, adopted February 28, 2011 and affirmed by the voters in the August 16, 2011 referendum, authorized the Council to make its decision whether to proceed with Viaduct replacement contracts at a public meeting *after* issuance of the FEIS. Ordinance 123542, Section 6 states:

> The City Council is authorized to decide whether to issue the notice referenced in Section 2.3 of each Agreement. That decision shall be made at an open public meeting held after issuance of the Final Environmental Impact Statement."[24]

On its face, the ordinance recognizes that the environmental considerations disclosed in the FEIS will provide information to be used in the eventual City Council decision process. Issuance of the FEIS is not itself an action that is binding on the Seattle City Council.

The Board has consistently rejected challenges to city or county resolutions or ordinances that do not adopt plans but simply constitute part of the decision process. Discussion of a

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[21] *Loveless v. Yantis*, 82 Wn.2d 754, 765, 513 P.2d 1023 (1973).
[22] *King County v. Boundary Review Board*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993).
[23] 109 Wn. App. 6, 14, 31 P.3d 703 (2001) (emphasis added), citing *Anderson v. Pierce County*, 86 Wn. App. 290, 300, 936 P.2d 432 (1997) and RCW 43.21C.030(2)(c).
[24] Menzel Declaration, King County Voter Pamphlet, p. 58.

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project, study and analysis of a project, or urging a position on a project are not GMA adoptions within the Board's jurisdiction.

As clearly illustrated in *Lake Stevens v. City of Snohomish*,[25] an action within the Board's jurisdiction must be a decision legally committing the local government to a course of action or having binding land use effect. In *Lake Stevens*, the City of Snohomish passed a resolution concerning planning for an area not in the city but adjacent to the City's UGA. The resolution "established" and "hereby adopts" a planning area in the county, stating the city would "proceed" with comprehensive planning for that area. Nevertheless, the Board found it lacked jurisdiction, noting the city lacked control over the area and was merely "urging Snohomish County to incorporate" the proposed boundary. The resolution was not a binding land use action and the Board lacked jurisdiction to hear the appeal.

In *Harless v. Kitsap County*,[26] the Board found an ordinance directing the preparation of amendments to the County's Plan and development regulations, but not adopting them, was outside the Board's jurisdiction. [27]

In *Open Frame LLC v. City of Tukwila,*[28] the Board found that preliminary consideration of a transit station, including siting, design, and financial proposals, was insufficient to create a *de facto* amendment within the Board's jurisdiction.

> What the Petitioner challenges with the stated actions [a Transportation Improvement Program Resolution, City staff emails, stakeholder meetings, concept plans, design meetings, etc.] is not a final action of the City but the City's *preliminary decision-making pro*cess – the evaluation of the alternatives; the shifts in perspective; the backward, the forward, and the sideways moves.

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[25] CPSGMHB Case No. 09-3-0008, Order of Dismissal (July 6, 2009)
[26] CPSGMHB Case No. 02-3-0018c, Order on Motions (Jan. 23, 2003)
[27] See also, *Fallgatter VI v. City of Sultan*, CPSGMHB Case No. 06-3-0017, Order on Motion (June 29, 2006) at 6, dismissing challenge to a task order authorizing retention of a planning consultant for capital facilities work, explaining: "The Board's jurisdiction, as limited by RCW 36.70A.280(1), does not include such preliminary matters"; *Agriculture for Tomorrow v. Snohomish County*, CPSGMHB Case No. 99-3-0004, Order on Dispositive Motion (June 18, 1999) (ordinance setting the docket of proposed comprehensive plan amendments for study was not within the Board's jurisdiction).
[28] CPSGMHB Case No. 06-3-0028, Order of Dismissal (Nov. 17, 2006), at 6-7

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> Nothing in the Record demonstrates that any of these actions constitutes a final action by the City in "locating" the Transit Center.

As set forth above, neither proposing a project for consideration under SEPA nor issuing an FEIS that analyzes the environmental consequences of a proposed project has the effect of requiring that action or altering land use.[29] Thus, the FEIS challenged here cannot be construed as a *de facto* plan amendment sufficient to provide jurisdiction. Petitioner has simply failed to identify a government action that triggers Board review.

Additionally, the Board notes the Viaduct replacement is a highway construction project being undertaken by WSDOT. The Board generally lacks jurisdiction to review WSDOT projects. Pursuant to RCW 34.05.514 and .570(4), WSDOT decisions on projects, including accompanying SEPA analyses, are reviewable by appeal to superior court under the APA. The Petitioner urges the Board to wait for a full record to allow him to identify the action finalizing the State's "adoption" of the project. The Board concludes it lacks jurisdiction to review an appeal of WSDOT's decision finalizing the project or any related SEPA violations. Thus an allowance of time to identify that decision point would be a futile exercise.[30]

As to the City's action, the Board's review jurisdiction is further constrained by RCW 36.70A.290(2) which establishes a jurisdictional requirement to challenge a local legislative action within sixty days of publication by the city or county legislative body:

> All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter [GMA] or chapter 90.58 [SMA] or 43.21C RCW [SEPA] must be filed within sixty days after publication by the county or city as provided in (a) through (c) of this subsection….

SEPA specifies that the deadline for appeal of the underlying governmental action applies to a SEPA appeal. RCW 43.21C.075 (2)(b) provides:

> Appeals of environmental determinations made (or lacking) under this chapter

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[29] See *Moss v. Bellingham*, supra.

[30] Additionally, there is no statutory authority for the Board to extend the 60-day deadline to allow Petitioner to amend his PFR.

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> shall be commenced within the time required to appeal the governmental action which is subject to environmental review.

Petitioner has failed to identify and challenge any legislative action by the City that constitutes adoption or amendment of a plan or regulation, or even *de facto* amendment. Lacking identified action, the Board cannot determine whether the PFR is timely.[31]

In the Board's view, these statutory provisions leave no room for the Petitioner to appeal the FEIS as a springboard for discovery to determine the governmental action that he opposes.[32] Under the GMA and SEPA, the Petitioner has the burden of identifying the formal adoption of a proposal by the government agency and bringing the challenge within sixty days. No final action has been identified and appealed in this case, and the challenge to the FEIS must be dismissed.

Conclusion

The Board finds and concludes it lacks subject matter jurisdiction to review the petition because the petition challenges only a SEPA document without identification and appeal of an associated governmental action adopting or amending a comprehensive plan. Pursuant to RCW 36.70A.280(1), RCW 36.70A.290(2) and RCW 43.21C.075, the City's and State's motions to dismiss for lack of jurisdiction are **granted**.

IV. PETITIONER'S MOTION FOR SUMMARY JUDGMENT

In the Prehearing Conference, the Board recognized this case as "atypical" in two respects: (a) the FEIS was challenged in isolation from identification of an ordinance or other governmental action, raising a threshold question of jurisdiction,[33] and (b) the record is

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[31] Petitioner's theory is that the project was finalized prior to issuance of the FEIS. First Declaration of Petitioner, at 2.

[32] See also WAC 242-03-300

[33] Prehearing Order at 3-4: "As discussed at the Prehearing Conference, the Petition in this case raises questions concerning the Board's jurisdiction. All three parties indicated an intention to bring dispositive motions. The Board agreed to defer the requirement for an Index until the question of its jurisdiction in this

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unusually voluminous.[34] The Board made three adjustments to its "typical" case procedure: (a) extending the schedule for dispositive motions to allow full briefing on the question of jurisdiction; (2) allowing Petitioner to move for "summary judgment" in order to allow his full input on the question of the Board's jurisdiction;[35] and (c) deferring the requirement for an Index of the record until resolution of the threshold jurisdictional question.

The Prehearing Order did not and could not alter the rules defining the Board's statutory jurisdiction. As noted above, the GMHB is a tribunal of limited authority, operating under a statute that is not liberally construed.[36]

Petitioner affirmatively asserts the Board has jurisdiction, basing the assertion on four arguments in his Motion for Summary Judgment. The Board reviews each of Petitioner's arguments below and finds none of them alters its conclusion that it lacks jurisdiction to hear this appeal.

SEPA Procedure

Petitioner's first issue is "lack of SEPA completion prior to project finalization."[37] Petitioner contends: "A completed SEPA process should have been required prior to project finalization." He states the issue as "whether the delay of completion of a SEPA-required review past the project's finalization is subject to GMA jurisdiction."[38]

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matter is decided… Accordingly the case schedule allows **cross-motions to be filed simultaneously** by all parties."

[34] Prehearing Order at 5: "At the State's request, and in light of the volume of materials involved, the Board will allow the Index to be filed after dispositive motions are decided, as the Order on Motions may narrow or clarify the issues, or dispose of some or all of the case."

[35] The Central panel of the Board does not ordinarily hear motions for summary judgment. See, e.g., *1000 Friends v. Snohomish County*, CPSGMHB Case No. 04-3-0018, Order on Motions (Aug. 6, 2004), at 2.

[36] Contrary to the Petitioner's wishes, the Board cannot expand its jurisdiction or shape its case management to rule on all the land use disputes which parties might wish to resolve.

[37] Petitioner's Summary Judgment Motion at 1

[38] Petitioner's Response to City of Seattle's Motion on Jurisdiction and Standing, at 2.

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As noted above, in a GMA proceeding, the petitioner in his PFR must identify the government action being challenged. The GMA does not allow a petition to be filed as a means to discovery to determine when the government agency made a decision or a city or county took legislative action. These limitations of GMA appeals arise from express language in the GMA[39] and are underscored by the SEPA provisions prohibiting "orphan" SEPA appeals.[40]

Petitioner contends it is widely known the City and State "finalized" their intentions for the Viaduct replacement prior to issuance of the FEIS. However, the intentions of elected officials or other government personnel do not trigger the basis for an appeal; rather, some formal action must be taken that is binding on the local government or state agency. Lacking identification of an action that constitutes project finalization, Petitioner's allegation of improper SEPA procedure (final decision prior to SEPA completion) is not entitled to summary judgment and does not provide a basis for Board jurisdiction.[41]

De Facto Amendment

Petitioner argues: "The Project is of sufficient size and general scope to be a *de facto* amendment of the Seattle comprehensive plan."[42]
Based on the authorities cited at length above, a SEPA determination is an informative analysis, and its issuance is not a governmental action with binding land use effect. Issuance of the FEIS did not amend the Seattle comprehensive plan, regardless of the size and scope of the Viaduct replacement project.

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[39] RCW 36.70A.280(1), .290(2), 300(1).
[40] RCW 43.21C.075
[41] The Board agrees with Petitioner that the August 16, 2011 referendum vote did not constitute final action for purposes of Board jurisdiction. The Board's authority is limited to the legislative action of local government legislative bodies. A challenge to the vote of the citizenry is beyond the Board's jurisdiction. *Style v. King County*, CPSGMHB Case No. 98-3-0009, Order of Dismissal (Feb. 13, 1998).
[42] Petitioner's Summary Judgment Motion at 1

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Project Financing

Petitioner argues the financing for the Viaduct replacement "ignored mandates from the Washington State Legislature to establish legally binding cost overrun responsibility within the City of Seattle."[43] The Petitioner refers to RCW 47.01.402 – the 2009 legislation establishing funding, accountability and responsibility for the Viaduct replacement project – deep bore tunnel option. RCW 47.01.402(6)(b) states, in pertinent part:

> Any costs in excess of two billion eight hundred million dollars shall be borne by property owners in the Seattle area who benefit from replacement of the existing viaduct with the deep bore tunnel.

The Board notes the GMA contains requirements for transportation financing[44] and for local, state, and federal coordination of major transportation projects.[45] However, although the topic of project financing is within the scope of the GMA, the Board's authority in a particular case only arises from timely appeal of specific governmental action, adopting or amending a comprehensive plan or development regulation.

In essence Mr. Tooley is alleging the City and State have violated RCW 47.01.402.[46] From its earliest cases, the Board has acknowledged it does not have jurisdiction to determine compliance with statutes other than those named in RCW 36.70A.280(1).[47] Flaws in Viaduct replacement financing arising from violation of RCW 47.01.402, no matter how egregious, do not provide the Board a basis for jurisdiction.

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[43] *Id.*
[44] RCW 36.70A.070(6)(a)(iv)
[45] RCW 36.70A.420, .430.
[46] See Petitioner's Preliminary Motion for Finding and Orders Regarding Financial Matters (Oct. 22, 2011), calling for an order requiring implementation of RCW 47.01.402.
[47] *Gutschmidt v. City of Mercer Island*, CPSGMHB Case No. 92-3-0006, Final Decision and Order (March 16, 1993), at 10; see also, *Hayes v. Kitsap County*, CPSGMHB Case No. 95-3-0081, Order Granting Motion to Dismiss (April 23, 1996) at 6 (RCW 36.94.140); *Green Valley v. King County*, CPSGMHB Case No. 98-3-0008c, FDO (July 29, 1928) at 12 (RCW 89.08.010); *Skills Inc. v. City of Auburn*, CPSGMHB Case No. 07-3-0008c, FDO (July 18, 2007) at 7 (RCW 35.63.120).

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319 7th Ave. SE, Suite 103
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Regional Coordination

Petitioner asserts the Board has jurisdiction because the GMA requires regional coordination.[48] Petitioner argues: "This mega-project has substantial ramifications for the funding of other regional transportation projects [and] other environmental mitigation measures including mode splits."[49] Petitioner asserts the opportunity costs of the Viaduct replacement provide a basis for GMHB jurisdiction.

Again, the Board does not have jurisdiction unless a government action has been identified and challenged in the PFR. The importance of a project in the regional context does not alter this statutory limitation.

Conclusion

Based on the authorities cited above, the Board concludes Petitioner's summary judgment arguments do not address and are insufficient to meet the statutory requirements for Growth Management Hearings Board subject matter jurisdiction. The Motion for Summary Judgment is **denied**.

V. PETITIONER'S STANDING

Positions of the Parties

The City and State both challenge Petitioner's standing to raise SEPA claims. The City alleges failure to exhaust administrative remedies by lack of timely comment on the EIS as required by WAC 197-11-545 (no comment means no SEPA objection.)[50] The City further asserts Petitioner has made no showing of interests within the scope of SEPA; rather, his objection is specifically targeted at the economics of the project. The City also asserts Petitioner can show no injury in fact, as he is a resident of Colorado, not Seattle.

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[48] Petitioner's Summary Judgment Motion at 1, citing RCW 36.70A.420, .430
[49] Petitioner's Reply, at 2.
[50] City Dispositive Motion at 12-13

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The State documents the public process for the Viaduct replacement environmental analysis.[51] The State contends Petitioner did not testify at any of the three public hearings held in Seattle in November 2010 nor submit timely written comment.[52] The State argues Petitioner meets neither the SEPA comment requirement nor the test for GMA participation standing. [53]

The Petitioner's various filings state that he was prevented from timely participation by his disability, which was caused by threats and intimidation from city and state officials.[54] Petitioner also provides a declaration as a basis for standing, indicating his training, his professional qualifications and his citizen activism on land use matters.[55] Petitioner states he has moved from Seattle to Colorado and back to Seattle, where he currently resides.[56]

Applicable Law

RCW 36.70A.280(2) provides:

> A petition may be filed only by …(b) a person who has participated orally or in writing before the county or city regarding the matter of which a review is being requested: .. or (d) a person qualified pursuant to RCW 34.05.530.

RCW 34.05.530 provides standing to a "person aggrieved or adversely affected" by agency action. All three of the following conditions must be met:

(1) The agency action has prejudiced or is likely to prejudice that person;

(2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

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[51] State's Dispositive Motion, at 2
[52] Hanson Declaration, paragraphs 5, 8, and 9
[53] State's Dispositive Motion, at 4-6
[54] Baxendale Declaration, Ex. 1
[55] First Declaration of Petitioner (Oct. 13, 2011)
[56] *Id*. at 2; Petitioner's Response to City of Seattle's Motion on Jurisdiction and Standing, at 2.

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319 7th Ave. SE, Suite 103
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Phone: 360-586-0260
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WAC 197-11-545(2) indicates the effect of a member of the public not submitting comments to the lead agency during the SEPA comment period (emphasis added):

> (1) **Other agencies and the public**. Lack of comment by other agencies or members of the public on environmental documents, within the time periods specified by these rules, *shall be construed as lack of objection* to the environmental analysis, if the requirements of WAC 197-11-510 [notice] are met.

Under the SEPA rules, failure to comment on a SEPA document within the comment period "shall be construed as lack of objection."[57] One of SEPA's purposes is to ensure complete disclosure of the environmental consequences of a proposed action before a decision is taken.[58] Participation and objection to the environmental analysis is therefore a prerequisite to a petition for review of agency SEPA compliance. [59]

As explained by the Pollution Control Hearings Board: [60]

> Participation in public hearings, or commenting through the environmental review process, are in some circumstances the only administrative remedy available to a party and thus are the forums in which exhaustion of remedies must occur in order for the party to later make a claim…. In this case, it is undisputed that [petitioners] did not make any comment during the environmental review process….

Findings of Fact and Conclusions of Law

Having reviewed the submissions of the parties, the Board makes the following findings of fact:

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[57] Professor Settle comments: "Since this provision does not purport to absolutely bar legal challenge for nonparticipation in the DEIS commenting process, apparently common law principles of waiver and exhaustion of administrative remedies would govern." Richard L. Settle, The Washington State Environmental Policy Act, A Legal and Policy Analysis, Section 14.01 [10], pages 14-76/77 (12/03 ed.)

[58] *Kitsap County v. DNR,* 99 Wn.2d 386, 391 (1983); *King County v. Boundary Review Board*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993); *Shoreline III and IV v. Snohomish County*, CPSGMHB Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Order on Dispositive Motions (Jan. 18, 2010), at 6-7.

[59] *Citizens v. Mount Vernon*, 133 Wn. 2d 861, 869, 947 P.2d 1208 (1997)

[60] *Spokane Rock Products, Inc., et al, v. Spokane County Air Pollution Control Authority*, PCHB No. 05-127, Order Granting Motion for Summary Judgment (Feb. 13, 2006), at 10.

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319 7th Ave. SE, Suite 103
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Fax: 360-664-8975

- Notice of the availability of the 2010 Supplemental Draft EIS for public comment was published in the Federal Register (Oct. 29, 2010), Seattle Times (Oct. 29, 2010), and Seattle Daily Journal of Commerce (Nov. 4, 2010). [61]
- The Notice invited written or emailed comments to WSDOT and set December 13, 2010 as the end of the comment period.
- The Notice set three public hearings in Seattle November 16, 17, and 18, 2010, jointly hosted by FHWA, WSDOT and the City of Seattle.
- WSDOT provided primary coordination for the public participation process, including compiling and responding to comments.[62]
- WSDOT has searched its databases for the four environmental documents for the project and has found no record of comment from Mr. Tooley during any of the comment periods.[63]
- Mr. Tooley does not allege that he attended any of the public hearings or made written or oral comment during the comment period that closed December 13, 2010.
- On February 15, 2011, Mr. Tooley published a comment on his blog at Motleytools.com/Blog and sent copies via certified mail on February 19, 2011, to both WSDOT and the Seattle Department of Transportation. [64]
- WSDOT received a comment from Mr. Tooley on February 22, 2011, two months after the close of the SDEIS comment period.[65]
- Mr. Tooley's February 15, 2011 blogs begins: "These comments are submitted late …" The blog states Mr. Tooley suffered disabling physical conditions as a result of sexual defamation backed up by threat of assassination by Seattle and State armed police. "It is the effects of this action that cause my comments to be late."[66]

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[61] Hanson Declaration, Exhibit A
[62] Hanson Declaration, paragraph 1
[63] Hanson Declaration, paragraph 8.
[64] Baxendale Declaration, Exhibit 1; PFR, at 2.
[65] Hanson Declaration, paragraph 9.
[66] Baxendale Declaration, Exhibit 1

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- Mr. Tooley's February 15, 2011 blog focused on the financial flaws of the project.[67]
- Mr. Tooley in his PFR claims participation standing based on the comments published in his blog and sent to the City and State.[68]

Based on the above, the Board enters the following conclusions of law:

- The PFR challenges an environmental document under SEPA – the 2011 FEIS for the Alaskan Way Viaduct Replacement Project.
- Petitioner failed to submit comment on the 2010 SDEIS within the comment period established in the notice. Pursuant to WAC 197-11-545(2), the lack of timely comment "shall be construed as lack of objection" when notice requirements have been met.
- Petitioner submitted a comment after the close of the comment period and acknowledged that his comment was late.
- By failing to submit timely comment on SEPA documents, Petitioner lacks participation standing for his SEPA challenge.
- The "zone of interest" protected by SEPA, as defined by our courts, concerns

  > 'broad questions of environmental impact, identification of unavoidable adverse environmental effects, choices between long and short term environmental uses, and identification of the commitment of environmental resources.'[69]

  Economic interests are not within the "zone of interest" protected or regulated by SEPA.[70]

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[67] *Id.* "[C]omplete lack of ,,, financial integrity;" "statewide political bullying to extort money;" "project is even more flawed … in financial aspects;" "planned cost overrun requiring additional unbudgeted expense and legal fees;" "constructive comments [of responsible citizens] are grounded in fiscal responsibility and fiduciary responsibility to the public's money."
[68] PFR at 2, Section IV
[69] *Kucera v. Washington State Department of Transportation*, 140 Wn.2d 200, 212-213, 995 P.2d 63 (2000), quoting *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn.App. 44, 52-53, 882 P.2d 807 (1994).
[70] *Harris v. Pierce County*, 84 Wn. App. 222, 231, 928 P.2d 1111 (1996).

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Fax: 360-664-8975

- Petitioner's interests expressed in his comment were in the fiscal aspects of the project and, as such, were not within the zone of interests SEPA is designed to protect.
- By failing to allege injury in fact that falls within the SEPA zone of interests, Petitioner lacks standing to challenge a SEPA determination.

The Board concludes it lacks statutory jurisdiction because Petitioner lacks standing to challenge the Viaduct replacement FEIS. The Petition must be **dismissed**.

VI. SERVICE OF THE PETITION FOR REVIEW

Applicable Law

The Board's Rules of Practice and Procedure, WAC 242-03-230, contain the following provisions concerning service of the PFR:[71]

> (2)(a) A copy of the petition for review shall be served upon the named respondent(s) and must be received by the respondent(s) on or before the date filed with the board.
>
> (b)…When the state of Washington is a respondent, the office of the attorney general shall be served at its main office in Olympia unless service upon the state is otherwise provided by law.
>
> (4) The board may dismiss a case for failure to substantially comply with this section.

Findings of Fact

Having reviewed the submittals of the parties, the Board makes the following findings of fact:

- Mr. Tooley's PFR was filed with the Board on July 29, 2011.
- Mr. Tooley did not serve the petition on Governor Christine Gregoire at her executive office.[72]

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[71] WAC 242-03-230(2)
[72] Minjares Declaration, paragraph 2

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319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

- Mr. Tooley did not serve the petition on the headquarters office of WSDOT nor on the main office of the Attorney General located in the Highways and Licensing Building in Olympia.[73]
- The assistant attorney general representing the State of Washington in this matter learned of the filing of the PFR on August 3, 2011, when the Board's office assistant sent an email to the parties concerning proposed dates for the prehearing conference. [74]
- On August 25, 2011, Mr. Tooley served the PFR on the Transportation and Public Construction Division of the Attorney General's Office in Tumwater.[75]

Conclusion

The Board having concluded above that it lacks subject matter jurisdiction and that Petitioner lacks standing to challenge the FEIS under SEPA, the Board declines to make a determination concerning efficacy of service on the State.[76]

VII. SUFFICIENCY OF PFR

The State asserts the PFR failed to include essential elements required by the Board's Rules in WAC 242-03-210. The Board has determined above that it lacks jurisdiction because the PFR fails to identify a government action (and date of the action) being challenged. The Board declines to make any further determinations concerning sufficiency of the petition.

VIII. ORDER

Based on the Petition for Review and the submissions of the parties, the GMA and SEPA, the Board's Rules of Practice and Procedure, applicable case law, and having deliberated on the matter, the Board ORDERS:

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[73] *Id.* paragraphs 3 and 4.
[74] *Id.* Exhibit A.
[75] Tooley Response to State, at 2; State Reply, at 3
[76] Board Member Margaret Pageler files a concurring opinion addressing this issue.

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319 7th Ave. SE, Suite 103
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- The Board finds and concludes it **does not have jurisdiction** to review the FEIS for the Alaska Way Viaduct Replacement Project. The Motions of the City of Seattle and the State of Washington to dismiss the Petition for Review for lack of Board jurisdiction are **granted.**
- Petitioner's Motion for Summary Judgment concerning jurisdiction is **denied.**
- The Petition for Review is **dismissed.**
- The case of *Douglas Tooley v. City of Seattle and State,* GMHB Case No. 11-3-0008, is **closed.**

Dated this 8th day of November, 2011.

_____
Margaret Pageler, Board Member

_____
Joyce Mulliken, Board Member

_____
Raymond Paolella, Board Member

Concurring Opinion of Board Member Margaret Pageler:

I agree with the outcome of this case. I would also find that Petitioner failed to substantially comply with the requirement for service of the PFR on the State. I would conclude that defects of service are an additional basis for dismissal of the challenge against the State.

The GMA contains no express language requiring service of a PFR on any respondent. The GMA does, however, require the Board to adopt "rules regarding expeditious and summary disposition of appeals."[77] The requirement for the Petitioner to promptly serve the

[77] RCW 36.70A.270(7).

Growth Management Hearings Board
319 7th Ave. SE, Suite 103
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PFR on the respondent city, county or state agency has therefore been a part of the Board's Rules of Practice and Procedure from their first promulgation.[78] Disposition of cases will never be "expeditious" if delay in serving the responding city, county or state agency is tolerated.

In the present case, service of the PFR on the State was never properly made; rather, service was almost a month late and was made to the wrong office. I would find that service of the PFR did not "substantially comply" with WAC 242-03-230(2) and would enter an order of dismissal on that basis also. In all other respects, I concur in the decision of the Board.

_____
Margaret Pageler, Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-03-830.[79]

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[78] WAC 242-03-230(2), formerly WAC 242-02-230(1)

[79] Pursuant to RCW 36.70A.300 this is a final order of the Board.
Reconsideration. Pursuant to WAC 242-03-830, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-03-240(1). The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.
Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.
Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

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ATTACHMENT A
LEGAL ISSUES in CASE NO. 11-3-0008

1) Does the Mega-Project Alaskan Way Viaduct Replacement Tunnel require an amendment of the Comprehensive Plan of the City of Seattle, specifically the following sections of the Transportation Element:

    A. Make the best use of the streets we have; TG 2 & TG 3
    B. Increasing Transportation Choices; TG8, TG11(**Mode Choice Goals**), T18, T19
    C. Measuring Levels of Service(**LOS**); T66 & T67
    D. Financing the Transportation System; T75
    E. The project specific Transportation Strategic Plan, incorporated by reference.

2) Does the Tunnel Project Action itself amount to a de-facto amendment of the Comprehensive Plan of the City of Seattle or any sub-area that was undertaken without proper GMA procedure in addition to SEPA violations?

3) Do those SEPA violations re: standard project procedure rise to the level of Growth Management Act significance and/or jurisdiction of the State Growth Management Hearings Board?

4) Is the coordination requirement of RCW 36.70A.100 violated by the project itself or the absent SEIS procedures, in failure to coordinate City plans with Puget Sound Regional Council plans?

5) Are project actions that are clearly financially imprudent in the context of local and regional comprehensive plan documents under the jurisdiction of any agency or authority, including the GMHB?

6) Is the State of Washington bound by the Growth Management Act and any conclusions that can be inferred from plans created under that authority? In particular, does the State requirement of compliance with local comprehensive plans and development regulations under RCW 36.70A.103 provide jurisdiction?

7) Do Growth Management Act requirements including public process require a consistent application throughout any subsidiary actions and/or projects?

8) If the GMHB has jurisdiction over a challenge to the Alaskan Way Viaduct Replacement Tunnel or the Final Environmental Impact Statement, then:
    a. Should a Comprehensive Plan amendment process be required before any further Tunnel construction? Should the project be cancelled in its entirety?

Growth Management Hearings Board
319 7th Ave. SE, Suite 103
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b. Given these violations, including SEPA procedure, should all proponents be held financially proportionately responsible for this fraudulent action?
c. Does the obstruction of citizen participation, via court interference, harassment and bullying, violate RCW 36.70A.020?
d. Does lack of regional coordination required by RCW 36.70A.100 amount to civil or criminal conspiracy?
e. Has the State of Washington violated the Comprehensive Plan and/or development regulations of the City of Seattle through this action?
f. Does the action violate RCW 36.70A.140 requirements concerning public participation and so require invalidation?

9) If the GMHB lacks jurisdiction over the Alaskan Way Viaduct Tunnel project, is the GMA and GMHB a fraudulent legal framework for institutionalized barratry consistent with other illegal practices of the Alaskan Way Viaduct proponents?

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ATTACHMENT B
LOG OF FILINGS in CASE NO. 11-3-0008

Date	Title	Exhibits/Attachments	By
7/29/11	Letter of Transmittal; Petition for Review and Request for Reasonable Accommodation		Douglas Tooley
8/5/11	Notice of Hearing and Preliminary Schedule; DOS		Margaret Pageler
8/11/11	Notice of Appearance; DOS		Eleanore Baxendale
8/11 & 15/11	Correspondence re: telephonic participation in PHC and changing PHC to be held telephonically		Stephen Klasinski; Douglas Tooley; Vanessa Smith
8/18/11	Notice of Appearance; COS		Stephen Klasinski
8/19/11	Governor's Objection to Filing Index; COS		Stephen Klasinski
8/25/11	Response to Governor's Objection to Filing Index; Second Statement of Issues Regarding Jurisdiction; Petitioner's Preliminary Index of Record; Proof of Service		Douglas Tooley
8/25/11	Prehearing Conference Agenda; DOS		Margaret Pageler
8/31/11	Prehearing Order; DOS		Margaret Pageler
9/12/11	Proof of Service		Douglas Tooley
9/28/11	Respondent City of Seattle's Dispositive Motion on Jurisdiction and Standing; City of Seattle's Motion to Supplement the Record for Dispositive Motions and Declaration of Eleanore Baxendale; DOS	Declaration of Eleanor Baxendale	Eleanore Baxendale
9/29/11	State's Dispositive Motion for Dismissal; COS	**Exhibit 1:** Declaration of Allison Hanson in Support of Respondent's Motion for Summary	Stephen Klasinski; Allison Hanson;

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Phone: 360-586-0260
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Date	Title	Exhibits/Attachments	By
		Judgment and Exhibits A & B **Exhibit 2:** Declaration of Melissa Minjares in Support of Respondent's Motions for Summary Judgment and Exhibit A	Melissa Minjares
9/29/11	Motion for Summary Judgment; Brief of Petitioner		Douglas Tooley
10/6/11	Respondent City of Seattle's Response to Petitioner's Motion for Summary Judgment and Petitioner's Brief; City of Seattle's Second Motion to Supplement the Record for Dispositive Motions; DOS	Declaration of Laurie Menzel in Support of Respondent City of Seattle's Response to Petitioner's Motion for Summary Judgment	Eleanore Baxendale; Laurie Menzel
10/6/11	State's Response to Petitioner's Motion for Summary Judgment; COS		Stephen Klasinski
10/6/11	Response to City of Seattle's Motion on Jurisdiction and Standing Response to State's Dispositive Motion for Dismissal		Douglas Tooley
10/13/11	State's Reply on State's Dispositive Motion for Dismissal; COS		Stephen Klasinski
10/13/11	Respondent City of Seattle's Reply on City Dispositive Motion		Eleanore Baxendale
10/13/11	First Declaration of Petitioner; Petitioner's Reply to Respondents Gregoire and Seattle Re: Motion for Summary Judgment; Petitioner's Procedural Motion Regarding Form of Evidence		Douglas Tooley
10/14/11	Petitioner's First Motion to Supplement the Record; Petitioner's Second Motion to Supplement the Record		Douglas Tooley

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Date	Title	Exhibits/Attachments	By
	.		
10/22/11	Petitioner's Third Motion to Supplement the Record Preliminary Motion for Finding and Orders Regarding Financial Matters		Douglas Tooley
10/26/11	Respondent City of Seattle's Opposition to Petitioner's Second and third Motions to Supplement the Record and Respondent City of Seattle's Motion to File a Late Response to Petitioner's Second Motion to Supplement the Record		Eleanore Baxendale
10/27/11	State's Response to Petitioner's Motions to Supplement the Record		Stephen Karpinski

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